

Citation: *R. B. v. Minister of Human Resources and Skills Development*, 2015 SSTGDIS 10

Appeal No: GT-118926

BETWEEN:

R. B.

Appellant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security

SOCIAL SECURITY TRIBUNAL MEMBER: E. Joanne Sajtos

HEARING DATE: January 29, 2015

TYPE OF HEARING: Telephone Conference

DATE OF DECISION: January 30, 2015

PERSONS IN ATTENDANCE

R. B., the Appellant

DECISION

[1] The Tribunal finds that a *Canada Pension Plan* (CPP) disability pension is payable to the Appellant.

INTRODUCTION

[2] The Appellant's application for a CPP disability pension was date stamped by the Respondent on January 27, 2011. The Respondent denied the application at the initial and reconsideration levels and the Appellant appealed to the Office of the Commissioner of Review Tribunals (OCRT).

[3] The hearing of this appeal was by teleconference for the reasons given in the Notice of Hearing dated September 17, 2014.

THE LAW

[4] Section 257 of the *Jobs, Growth and Long-term Prosperity Act* of 2012 states that appeals filed with the OCRT before April 1, 2013 and not heard by the OCRT are deemed to have been filed with the General Division of the Social Security Tribunal.

[5] Paragraph 44(1)(b) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:

- a) Be under 65 years of age;
- b) Not be in receipt of the CPP retirement pension;
- c) Be disabled; and
- d) Have made valid contributions to the CPP for not less than the Minimum Qualifying Period (MQP).

[6] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

[7] Paragraph 42(2)(a) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.

ISSUE

[8] There was no issue regarding the MQP because the parties agree and the Tribunal finds that the MQP date is December 31, 2006.

[9] In this case, the Tribunal must decide if it is more likely than not that the Appellant had a severe and prolonged disability on or before the date of the MQP.

[10] Given the Tribunal's determination on the issue of severe and prolonged on or before the date of the MQP, there was no need to determine the issue of incapacity.

EVIDENCE

[11] The Appellant was 40 years old on the date of the MQP. She applied for CPP disability benefits on October 2, 2006 and January 27, 2011,

Testimony

[12] The Appellant has a grade 12 education and a work history in bookkeeping and accounting office positions. She obtained employment with her last employer in 2001, as an expense analyst. When individuals were relocated by their employer, her job was to assist with their relocation by finding homes, shipping possessions and ensuring that their move was as seamless as possible. Each client file often weighed up to ten pounds.

[13] The Appellant testified that she “collapsed” at work in March 2004 due to her diabetes, stress and high anxiety. She returned to modified hours in January 2010. During her time on long term disability, she lived alone. She then lived with her mother from early 2005 until 2007. It was during this time that she developed frozen shoulder symptoms. In 2005 to 2006, the Appellant stated that she began to develop shoulder pain and discomfort, but she excused the problems believing that she had “just slept wrong” or had a “kink.” As the condition worsened, she found that she was not able to pick up even light objects and that she had to bend over to blow dry her hair because she could not raise her hands or arms. Her mother did many chores for her due to her shoulder and arm pain including helping her to shower and dress. Due to the extreme nature of the depression, the Appellant failed to note the increasing and consistent discomfort in her shoulders.

[14] The depression meant that the Appellant was unable to sleep at night and she spent her days in a dark room dozing or watching television. She lost weight, had “crazy thoughts” and “paced” in the living room. Although not wanting to be alone, she isolated herself from outside activities and friends. She described it as having been in a “dark” place.

[15] While depressed, the Appellant was unable to be alone for extended periods of time. Several types of medication were prescribed and were not successful. In 2007, when a medication was found that offered some relief from the depression, she moved back into her own apartment because she was attempting to normalize, as she “didn’t want to live like this.” In early January 2008, she was contacted by her insurance company and told that she had to return to work or she would be terminated. She did not feel able to return to work but felt “pressured” into doing so. When she had left work, it was due to her depression, but when she returned, she was also limited by her frozen shoulder disability.

[16] The Appellant stated that it was very stressful for her to return to work and she felt that had she been allowed more time to heal that she may have “gotten better” and then be able to return. Instead, in addition to substantially increasing her stress levels, the lifting of the files caused neck strain and worsened her frozen shoulder condition. Ultimately, she was diagnosed with fibromyalgia. Throughout the treatment for her depression and frozen

shoulder, her goal was always to return to work, but she testified that she was forced to do so prematurely.

[17] Although not noted in the file, the Appellant stated that she was forced to take sick days and leave early on a regular basis because she was not capable of working full time commencing the end of May 2010 until she ultimately aggravated her shoulders in July 2010. Prior to that time, she had been working on a graduated modified schedule. She was terminated from her employment in 2013.

[18] The Appellant stated that she was never able to work anywhere. Specifically, she stated that “If able to work, I would have gone back to the job.”

Documentary Evidence

[19] In a report dated January 5, 2005, Dr. Wong, a psychiatrist, stated that he first treated the Appellant in March 2004 for depression. She did not want anti-depressants and was referred to Dr. Vanik for psychotherapy, which still continued. Her depression became very severe and she began anti-depressants in July 2004, which improved her depression but she remained significantly depressed. She also complained of pain in her arms. The diagnosis was severe major depressive disorder.

[20] On March 9, 2005, Dr. Wong, stated that the Appellant initially refused anti-depressant medication but ultimately agreed when she became suicidal. She did not feel able to return to work part-time or full-time. She also complains of weakness and numbness in her forearms and “is planning to see her family physician soon regarding this.” Diagnoses were major depressive disorder with obsessive-compulsive features.

[21] A psychiatrist, Dr. Tewfik, in a report dated October 18, 2005, noted that he had received a referral for the Appellant. She was depressed and had an anxious mood. She had low energy, interrupted sleep patterns, poor ability to focus, poor motivation social isolation and negative thoughts about her life. She had low self-confidence, and was isolating herself due to fear of social situations. She was also experiencing recurrent

episodes of feeling high and energetic. She was diagnosed with bipolar II disorder and social anxiety disorder.

[22] On January 20, 2006, Dr. Gladstone, a neurologist, saw the Appellant who felt “awful everywhere.” She felt that her whole body had stiffened. Further studies were recommended, but there was an element of chronic fatigue syndrome.

[23] Dr. Tewfik, a psychiatrist, in a report of May 10, 2006, wrote to the Appellant’s insurance company stating that she had Bipolar disorder, Attention Deficit Disorder, NIDDM and hypercholesterolemia. She had bipolar disorder for several years and was first assessed in October 2005. Her illness was precipitated by overwhelming anxiety and stress in her life. She was restricted from strenuous mental or physical work or activities.

[24] In a Questionnaire for Disability Benefits, Canada Pension Plan, dated September 29, 2006, the Appellant wrote that she was unable to work beyond March 18, 2004 due to anxiety, stress and depression. She had severe episodes of mood swings, including periods of depression which are frequent. Poor concentration, low energy and forgetfulness. Her medications made her feel very tired.

[25] In a Medical Report, Service Canada, dated October 2, 2006, Dr. Tewfik wrote that the Appellant’s prognosis was poor due to bipolar disorder. She was suffering for a few years from recurrent and severe episodes of depression and anxiety. Also recurrent episodes of hypomania.

[26] Dr. Palter, an endocrinologist, in a report of July 17, 2007, noted that the Appellant was diagnosed with Type II diabetes in 1987. She was on long term disability due to anxiety. She was prescribed insulin.

[27] Dr. Potashner, a rheumatologist, in a report dated November 6, 2007, wrote that the Appellant was an expense analyst. She presented with significant pain in the upper extremity in the shoulder area, which has been present for the last year. There was no history of trauma. It was felt that she was suffering from bilateral frozen shoulder due to diabetes.

[28] On December 17, 2007, the psychiatrist recommended a return to work on January 14, 2008 on a part-time basis. On February 6, 2008, Dr. Tewfik wrote that the Appellant should continue her modified work schedule due to a mild setback in her illness.

[29] An orthopedic surgeon, Dr. Dantzer, in a report dated February 20, 2008, noted that the Appellant had bilateral adhesive capsulitis, which was present for over a year.

[30] On March 13, 2008, a physiotherapist recommended that the Appellant have a right sided platform for forearm support at her work station.

[31] A physiotherapist in a report of March 17, 2008 set out restrictions in the workplace based on the Appellant's frozen shoulder condition.

- 1) She is to limit work at or above the shoulder level, and avoid sustained work at this level.
- 2) She is to work as close to the midline as possible, for most of the day.
- 3) The angle of her hand and forearm (wrist joint) should be at or close to 0 degrees.
- 4) The angle of her forearm and upper arm (elbow joint) should be at 90 degrees.
- 5) Her upper arm should be vertical with the trunk of her body.
- 6) Her chair height should be adjusted accordingly to keep her wrist joints between 0 and 15 degrees.

[32] Dr. Tewfik wrote on April 17, 2008 that the Appellant was struggling and continues to suffer from residual symptoms of depression and anxiety. She had low energy, interrupted sleep, frequent forgetfulness and poor ability to concentrate. She had recurrent anxiety attacks. It was recommended that her modified work schedule be extended to avoid a relapse of more severe symptoms, which would "jeopardize her life" and ability to return to work full-time.

[33] The family physician, Dr. Iskander, in correspondence dated April 18 2008, wrote that the Appellant was suffering from bilateral adhesive capsulitis. She was to work modified hours of 6 hours per day for one month.

[34] On May 22, 2008, Dr. Tewfik, a psychiatrist, wrote that the Appellant was still under his care and that she would attempt to return to full-time work hours. It was noted that she also suffered from frozen shoulder, which could result in physical limitations.

[35] On July 8, 2008, Dr. Iskander told the Appellant to take a week off of work and have physiotherapy due to increased shoulder pain after having to move files.

[36] On December 2, 2008, Dr. Potashner, rheumatologist, wrote that the Appellant had several corticosteroid injections with no benefit done for her long history of frozen shoulder. Physiotherapy helped until she reinjured herself in the workplace in July 2008 and has been unable to work since. It was determined that the Appellant had “significant issues related to frozen shoulder, complicated by fibromyalgia, likely caused by trauma at work in July 2008.”

[37] Dr. Dantzer, an orthopedic surgeon, in a report of February 20, 2008, saw the Appellant for bilateral pain and stiffness in the shoulders with significantly restricted range of motion present for one year. The diagnosis was bilateral adhesive capsulitis.

[38] Dr. Tewfik, psychiatrist, in a report of February 28, 2009, diagnosed bipolar II disorder, with melancholic features, diabetes, bilateral frozen shoulder, fibromyalgia, arthritis, carpal tunnel syndrome, C4 prolapsed disc and vocal cord nodules. Her stressors were severe physical pain and disability with symptoms of hypomania. She was receiving psychotherapy once every four weeks.

[39] Dr. Potashner, a rheumatologist, in a report dated August 13, 2009, wrote that the Appellant had a longstanding history of frozen shoulder. Her major issue was fibromyalgia on the basis of mechanical neck and back problems. There was some improvement with her frozen shoulder condition. A recommendation was made to increase her Cymbalta due to fibromyalgia condition.

[40] In a Medical Report, Service Canada, dated January 17, 2011, Dr. Iskander wrote that the medical prognosis was poor. Diagnoses was bipolar depression, fibromyalgia, bilateral adhesive capsulitis, diabetes, vocal cord nodules, bulging disc C4-5 and arthritis right mid foot. She had difficult and painful range of movement in shoulders, pain and

tenderness in all her body, lack of motivation and concentration, mood swings and lack of sleep.

[41] In a Questionnaire for Disability Benefits, Canada Pension Plan, dated January 21 2011, the Appellant wrote that she stopped working on July 2008 due to injury and prolonged pain.

[42] Dr. Iskander wrote on May 16, 2011 that the Appellant “has been under my care since December 1, 2007, however, she has been under our office care since September 23, 1989, she suffered from multiple medical issues that include Bipolar disorder, Fibromyalgia, Bilateral adhesive Capsulitis, Insulin dependent Diabetes Mellitus, Vocal cord nodules, Bulging disc at c4-5 and Arthritis at right dorsum mid foot Due to her medical conditions, the Appellant was off on long term disability from March 2004 to January 2008. She tried to return to her work as modified work from January 2008 till May 2008 and she pushed herself to work full time until July 2008. After that she can't be able (sic) to work due to her medical problems and her daily medication. She was off work since July 2008 till today. She is under the care of Dr.Tawfik (Psychiatrist), Dr. Knight (Endocrinologist), and Dr. Potashner (rheumatologist). She takes a lot of medication. She is visiting my office regularly; last visit was on May 12, 2011.”

[43] In a Canada Pension Plan Disability Benefits Employer Questionnaire, dated May 25, 2011, it was stated that the Appellant started working as a relocation associate from March 2001 until July 2008. She was on short term disability from June 2004 until January 2008. On July 2008, she went on short term disability due to frozen shoulder. She returned to work part-time on January 14, 2008 and worked full-time from May to July 2008.

[44] Dr. Tewfik, in a report of May 16, 2012, wrote that between January and May 2008, the Appellant was on modified work. She then returned to full-time work, which was not successful and “she decompensated, both mentally and physically.” She was back on disability benefits in July 2008.

SUBMISSIONS

[45] The Appellant submitted that she qualifies for a disability pension because:

- a) Had she not been “pressured” into returning to work in January 2008, she would have recovered. The return to work, however, worsened her physical and mental health and she is now severely disabled.

[46] The Respondent submitted in writing on August 26, 2013 that the Appellant does not qualify for a disability pension because:

- a) An employee questionnaire of May 2011 confirmed that the Appellant’s attendance was fair, her work was satisfactory and she did not require special services, equipment or arrangements. She was able to handle the demands of her job and her earnings in 2008 were \$28,770 which is well above substantially gainful.
- b) Dr. Tewfik stated that the Appellant was not to participate in strenuous mental or physical work in May 2006. She may have to shorten work day, but there was no mention of disabled from work. February 2009, the doctor stated that the goal was to achieve remission and return to work.
- c) The Appellant was hesitant to take insulin for her diabetes but did do so on July 17, 2007.
- d) November 2007, the Appellant complained of pain in her upper extremities. She was diagnosed with bilateral shoulder frozen shoulder. It was complicated by trauma at work July 2008 and fibromyalgia. Her shoulder improved to some extent in August 2009.
- e) She was advised to perform modified work of six hours per day due to her frozen shoulders in April 2008, which identifies that the Appellant was capable of work well after December 2006.

f) In written submissions dated November 24, 2014, it was noted that the Appellant did not seek suitable employment elsewhere in 2008.

ANALYSIS

[47] The Appellant must prove on a balance of probabilities that she had a severe and prolonged disability on or before December 31, 2006.

Severe

[48] Section 42(2) (a) (i) of the CPP states that an individual must be “incapable regularly of pursuing any substantially gainful occupation” in order to qualify for disability benefits.

[49] On balance, the Tribunal is persuaded that the Appellant did have a severe disability on December 31, 2006. The Appellant was diagnosed with diabetes in 1987, which, as stated by the rheumatologist, may result in a frozen shoulder condition. The Respondent submitted that the Appellant complained of pain in her upper extremities in November 2007, which is post MQP. The Tribunal notes, however, that Dr. Wong, a psychiatrist wrote in January 2005 that she complained of pain in her arms, in March 2005, and she indicated that she had weakness and numbness in her forearms. In January 2006, a neurologist wrote that the Appellant felt awful “everywhere” and that her whole body had stiffened. Dr. Potashner, neurologist, stated in November 2007 that the Appellant had significant pain in the upper extremity in the shoulder area, which was present for more than a year; it was diagnosed as frozen shoulder due to diabetes. Dr. Dantzer, an orthopedic surgeon, in a report of February 2008 wrote that the Appellant had bilateral adhesive capsulitis for “over a year.” The timing of symptoms is consistent with the Appellant’s testimony that she developed symptoms in 2005 and 2006 but was too overwhelmed with her mental health condition to fully address the shoulder condition. Given the impairments arising from the mental health condition and frozen shoulders, which had not yet been diagnosed, the Tribunal is persuaded that the Appellant was severely disabled in December 2006. The Appellant’s position is that she was not “regularly” capable of performing employment since December 2006, based on the

combination of her mental health and frozen shoulder conditions. Her evidence is that she returned to work only because she was fearful of losing her employment.

[50] The Tribunal is of the view that the frozen shoulder condition combined with the mental health symptoms resulted in a substantial impairment. As a result of the shoulder condition, she was given workplace restrictions in March 2008 that were physically very limiting. She also worked reduced hours in addition to the modified job duties until May 2008, when, as noted by both the family physician and the Appellant, she pushed herself to return to full hours in a modified position. The testimony was that even for the few weeks that she attempted to work full hours, she rarely was able to do so and would take sick time or leave early. Given the Appellant's inability to perform the basic physical duties of her employment combined with the fact that the required duties substantially increased her stress levels and mental health condition, the Tribunal finds that this job cannot be considered to be substantially gainful employment.

[51] Prior to her last employment, the Appellant worked at various jobs and was able to successfully earn a living. It was only when she began to suffer from depression and was ultimately diagnosed with bipolar disorder, combined with her frozen shoulder condition, that she became unemployable. As noted by the treating psychiatrist and the Appellant, her goal was always to return to work because she wanted to be "better." The Respondent argued that because the psychiatrist discussed the fact that the goal was to return to work, it therefore meant that the Appellant could do so. The Tribunal does not accept this argument as it places significant weight on only one element of the evidence without balancing it with the totality of medical evidence and testimony.

[52] "Regularly" was defined in *Chandler v. MHRD* (November 25, 1996), CP 4040 (PAB), which although not binding is persuasive, as being capable of going to work as often as is necessary with predictability being the essence. In the case at hand, the Appellant required a high degree of accommodation due to her physical and emotional impairments. Even with the accommodations, the Appellant only worked sporadically and was forced off of work 5 or 6 weeks after commencing full-time hours. The family physician recommended the final departure from employment. Her psychiatrist wrote that

the return to work was not successful and the Appellant “decompensated both mentally and physically.” Based on the totality of the evidence, the Tribunal finds that the Appellant was not capable “regularly” of pursuing substantially gainful employment from December 2006 and ongoing.

[53] Based on the Appellant’s mental health condition and frozen shoulders disability, the Tribunal finds that that she is “incapable regularly of pursuing any substantially gainful occupation” in accordance with section 42(2) (a) (i) of the CPP.

Prolonged

[54] The CPP, at section 42(2) (a) (ii) states that a disability is prolonged if it “is likely to be long continued and of indefinite duration or is likely to result in death.” As set out in *MHRD v. Scott (July 10, 1998), CP 5741 (PAB)*, which although not binding is persuasive, the focus of inquiry is not an expected time of recovery, but rather an expectation of not being able to return to work that must be adjudicated.

[55] The Appellant’s testimony, which was supported by the medical evidence, is that she began to suffer from depression in 2004 and frozen shoulder symptoms in 2005 and 2006, which was not conclusively diagnosed until 2007, all of which are longstanding. Based on the medical reports from the family physician, psychiatrist, rheumatologist and orthopedic surgeon, all of the medical conditions are of indefinite duration, continuous and there is no expectation of recovery. Rather, the prognosis is poor.

[56] For these reasons, the Tribunal concludes that the Appellant’s disability is “prolonged” in accordance with the statutory definition.

CONCLUSION

[57] The Tribunal finds that the Appellant had a severe and prolonged disability in December 32, 2006, the date of her MQP. For payment purposes, a person cannot be deemed disabled more than fifteen months before the Respondent received the application for a disability pension (paragraph 42(2)(b) CPP). The application was received in January 2011; therefore the Appellant is deemed disabled in October 2009. According to

section 69 of the CPP, payments start four months after the deemed date of disability.
Payments will start as of February 2010.

[58] The appeal is allowed.

E. Joanne Sajtos

Member, General Division